STATE OF MICHIGAN

COURT OF APPEALS

KEVIN HAMM,

Plaintiff-Appellant,

V

PHOENIX CONTRACTORS, INC.,

Defendant-Appellee,

and

WOLVERINE CONTRACTING SERVICES, INC.,

Defendant.

UNPUBLISHED
June 5, 2008

No. 278040
Washtenaw Circuit Court
LC No. 05-000308-NO

Before: Davis, P.J., and Murray and Beckering, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant's[1] motion for summary disposition. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant was the general contractor hired to oversee renovations to the University of Michigan intramural athletic facility. Plaintiff was an employee of Wolverine Contracting Services, Inc. ("Wolverine"). Wolverine was a subcontractor for Great Lakes Environmental Services, Inc., which was a subcontractor for defendant, in connection with the renovation project.

Plaintiff was injured while renovating a locker room at the facility. At the time of the accident, plaintiff was sitting down during a break when a sudden gust of wind caused a large piece of plywood to blow into plaintiff, hitting him in the head and causing an injury. The

[1] References to "defendant" throughout this opinion will be to Phoenix Contractors, Inc only.

plywood was present to form a pathway over a rubberized running track in order to protect the track from workers walking across it to access a dumpster. Three other workers were present at the time of the accident.

The trial court granted defendant's motion for summary disposition under MCR 2.116(C)(10) on the ground that plaintiff had not established a genuine issue of material fact. This Court reviews a trial court's decision on a motion for summary disposition under the de novo standard of review. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

Summary disposition pursuant to MCR 2.116(C)(10) assesses the factual support for a claim. MCR 2.116(C)(10) provides for summary disposition where there is no genuine issue regarding any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). A court may only consider substantively admissible evidence actually proffered relative to a motion for summary disposition under MCR 2.116(C)(10). *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999).

Plaintiff's specific argument is that the trial court erred by failing to find that a genuine issue of material fact existed regarding defendant's liability for negligence under the "common work area doctrine." At common law, neither a landowner who enters a contract for the construction of an improvement to the land, nor a general contractor overseeing the construction project's completion, could ordinarily be found negligent for injury to a subcontractor's employee. *Ormsby v Capital Welding, Inc*, 471 Mich 45, 53; 684 NW2d 320 (2004). However, in *Funk v General Motors Corp*, 392 Mich 91, 104; 220 NW2d 641 (1974), abrogated on other grounds by *Hardy v Monsanto Enviro-Chem Systems, Inc*, 414 Mich 29; 323 NW2d 270 (1982), our Supreme Court held that a general contractor could be held liable if a subcontractor clearly failed in its duty to provide proper safeguards to its employees in common work areas.

It is not disputed that defendant was the general contractor of the renovation project. To establish the liability of a general contractor under *Funk*, a plaintiff must prove four elements: (1) that the defendant contractor failed to take reasonable steps within its supervisory and coordinating authority (2) to guard against readily observable and avoidable dangers (3) that created a high degree of risk to a significant number of workers (4) in a common work area. *Ormsby*, *supra* at 57, citing *Funk*, *supra* at 104. A plaintiff must satisfy all elements of the common work area doctrine before a general contractor may be found negligent under this theory of liability. *Id.* Here, plaintiff failed to provide evidence establishing the second and third elements of the exception.

First, plaintiff failed to present evidence demonstrating that defendant neglected to take reasonable steps to guard against a readily observable and avoidable danger. Plaintiff asserts

only that the plywood itself was readily observable because it was in plain view. However, the common work area doctrine requires that the danger be readily observable. Plywood alone is not inherently dangerous. The record contains no indication that either the large piece of plywood lying on the rubberized track as a protective cover or that the sudden gust of wind constituted a readily observable danger. Moreover, plaintiff conceded in his deposition that the plywood's condition did not appear to pose any significant threat to his safety. Plaintiff stated, "I didn't believe it [the plywood] would cause me any danger."

Second, regardless of whether the danger was readily observable, it must also have created a high degree of risk to a significant number of workers. *See Ormsby, supra* at 57. See, also, *Latham v Barton Malow Co*, 480 Mich 105, 109; 746 NW2d 868 (2008). Although plaintiff supplied evidence that multiple workers used the plywood path throughout the construction project, this fact only serves to demonstrate that the path was, generally speaking, a common work area. It must also be shown that the danger was posed to a significant number of workers. The danger to a significant number of workers is generally calculated at the time the plaintiff was injured. *Ormsby, supra* at 59-60 n 12. Plaintiff failed to demonstrate that the plywood represented a high degree of risk to a significant number of workers at the time the injury was sustained. Notably, at the time of the accident there were only three other individuals present at the renovation site.[2]

When viewing the facts presented in a light most favorable to plaintiff, plaintiff failed to establish all four elements of a claim under the common work area doctrine. Therefore, the trial court did not err in determining that plaintiff's claim fails as a matter of law. On this basis, summary disposition was properly granted.

The affidavit of plaintiff's expert witness does not alter this conclusion. Even if the opinions stated in the affidavit are considered true, and all inferences are viewed in the light most favorable to plaintiff, the affidavit does not establish any genuine issue of material fact. The affiant opines only that the plywood itself was readily observable, noting that "the plywood sheets used to protect the running track were large and readily observable." Again, a sheet of plywood by itself does not inherently constitute a readily observable danger. The affidavit did not suggest that anything made the piece of plywood dangerous or that that any other particular danger was readily observable.

Finally, the affidavit does not refer to facts establishing that there was a high degree of risk to a significant number of workers at the time of the accident. The affiant only stated that various workers were required to traverse the plywood to reach the dumpster during the course of the project, and not that a significant number of workers were exposed to the plywood at the

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[2] In *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 3; 574 NW2d 691 (1997), the plaintiff suffered an injury after falling from a porch overhang. This Court concluded that, because the plaintiff was one of only four men present, the defendant did not breach its duty to guard against a danger posing a high degree of risk to a significant number of workmen. *Id.* at 7-8.

time of the accident. Since the affidavit does not create a genuine issue of material fact, summary disposition was proper.

Affirmed.

/s/ Alton T. Davis
/s/ Christopher M. Murray
/s/ Jane M. Beckering